Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-861

CONNELLY CONTAINERS, INC.,

Petitioner,

v.

LAKE UTOPIA PAPER LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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LAKE UTOPIA PAPER LIMITED,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner Connelly Containers, Inc. (hereinafter called "Connelly") prays that a Writ of Certiorari be issued to review the judgment in the United States Court of Appeals for the Second Circuit entered in the above case on October 1, 1979 in favor of Respondent Lake Utopia Paper Limited (hereinafter called "Lake Utopia").

OPINIONS BELOW.

The opinion of the District Court and its final order are not reported but are set forth respectively in Appendices A and B. The opinion of the Court of Appeals is not reported but is set forth in Appendix C.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 1, 1979. On November 5, 1979, Connelly's Petition for Rehearing was denied. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Is the question of the application of the forum selection clause in this case a "pretext" for invalidating the arbitration award?

2. Does not the forum selection clause in the contract between the parties sufficiently specify New Brunswick, Canada as the forum for confirmation proceedings so that the District Court was not the proper venue under Section 9 of the United States Arbitration Act?

3. Even if the District Court had jurisdiction to entertain the petition of Lake Utopia to confirm the arbitration award, should not the District Court have refused to exercise such jurisdiction and instead dismissed the petition with directions to Lake Utopia to file its petition in the courts of New Brunswick, Canada?

STATUTES INVOLVED.

Although the principal issues in this case involve the question of whether the District Court properly applied the decisions of this Court, there is also involved in this case the question of whether the District Court has properly interpreted Section 9 of the United States Arbitration Act, 9 U. S. C. § 9 (1970), which is set forth in Appendix F attached hereto.

STATEMENT OF THE CASE.

This matter commenced in the District Court for the Southern District of New York when Lake Utopia filed its petition to confirm an arbitration award entered in its favor against Connelly in the amount of $650,000. Lake Utopia asserted that the District Court had jurisdiction of the petition under Section 9 of the United States Arbitration Act, 9 U. S. C. § 9 (1970). (R. Notice of Motion to Confirm Arbitration Award, ¶ 1 and ¶ 2).

On August 29, 1973, Lake Utopia and Connelly entered into an agreement in writing for the sale of certain corrugating medium in foreign commerce. (R. Petition to Confirm Arbitration Award, ¶ 3).

Paragraph 11 of the agreement between the parties provided as follows:

> 11. ARBITRATION: Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered by the highest court in New Brunswick, having jurisdiction." (R. Petition to Confirm Arbitration Award, Exhibit A, ¶ 11).

Lake Utopia is a corporation existing under the laws of New Brunswick, Canada with its principal place of business at Saint John, New Brunswick, Canada. (R. Petition to Confirm Arbitration Award, ¶ 1). Connelly is a corporation existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business at Bala Cynwyd, Pennsylvania. (R. Petition to Confirm Arbitration Award, ¶ 2).

Subsequent to the execution of the agreement, a dispute arose between the parties with Lake Utopia claiming

damages for Connelly's alleged failure to fulfill its obligations regarding purchases of corrugating medium under the agreement. (R. Petition to Confirm Arbitration Award, ¶ 5). As a result, Lake Utopia filed a Demand for Arbitration with the American Arbitration Association in New York City. (R. Petition to Confirm Arbitration Award, ¶ 6). The agreement between the parties did not specify the location for the holding of arbitration hearings but Lake Utopia requested and the American Arbitration Association finally determined that the hearing locale would be New York City.

After hearings and the submission of evidence, the arbitrators entered an award on January 5, 1979 in the amount of $650,000 in favor of Lake Utopia and against Connelly. (R. Petition to Confirm Arbitration Award, ¶ 7 and ¶ 8).

On January 30, 1979, Lake Utopia filed its Petition to Confirm the Arbitration Award in the District Court for the Southern District of New York. Connelly filed an answer to the petition raising various defenses. One of the defenses was that the filing of the petition was premature. (R. Answer of Connelly Containers, Inc., ¶ 9). The reason for asserting this defense was that counsel representing Connelly in the District Court had only been engaged one day prior to Lake Utopia filing its petition in the District Court and was completely unfamiliar with the arbitration proceedings and the dispute between the parties. (R. Affidavit of Harry P. Begier, Jr. in Opposition to Petition and Motion to Confirm Arbitration Award). However, because the Court granted an extension of time within which to brief the issues, Connelly withdrew this defense. (R. Supplemental Memorandum of Connelly Containers, Inc.).

Connelly raised two basic defenses to the petition in the District Court. First, since the parties had specified

in paragraph 11 of the contract the forum for confirmation proceedings of any arbitration award, the District Court lacked subject matter jurisdiction under Section 9 of the United States Arbitration Act, 9 U. S. C. § 9 (1970). (R. Answer of Connelly Containers, Inc., ¶ 10). Secondly, Connelly also asserted that the District Court should abstain from consideration of the petition since the contract between the parties provided that the law of New Brunswick, Canada was applicable to the dispute and since the parties had chosen in their agreement New Brunswick, Canada as the place for the confirmation of any arbitration award. (R. Answer of Connelly Containers, Inc., ¶ 13).

Connelly also raised in the alternative to the foregoing defenses the defense that the arbitrators manifestly disregarded Canadian law in making its award. (R. Answer of Connelly Containers, Inc., ¶ 11). Connelly raised this defense in the alternative only and did not pursue this defense in the appeal to the Second Circuit Court of Appeals. (R. Answer of Connelly Containers, Inc., ¶ 12). Thereafter, the District Court entered an order confirming the arbitration award and entering judgment on the award which including costs was $665,757.71. This order and judgment are set forth as Appendix B hereto.

The District Court also filed an opinion in support of its order which is set forth as Appendix A hereto. The view of the District Court with respect to the contentions raised by Connelly are succinctly set forth in the first sentence of the opinion as follows:

> "Once again, this Court is confronted with an instance of 'a losing party seizing upon 'pretext for invalidating an arbitration award' . . . [citation omitted] and seeking by tenuous and baseless contentions to delay the consequences of that award." (Appendix A, p. 1)

From this opinion and order, Connelly filed an appeal to the Second Circuit Court of Appeals. The Second Circuit in an opinion labeled per curiam affirmed the District Court confirmation of the award "substantially" on the opinion of the court below. However, the Second Circuit dismissed a claim for double costs and reasonable attorneys fees by Lake Utopia on the grounds that the appeal was frivolous. The opinion of the Court is set forth in Appendix C hereto.

Thereafter, Connelly filed a petition for rehearing with the Second Circuit which is set forth in Appendix D hereto. In its opinion, the Second Circuit stated the sole question on appeal was whether the United States Arbitration Act conferred jurisdiction on the District Court to confirm the award. The petition for rehearing pointed out that this was not correct and set forth the other questions raised on the appeal. Notwithstanding this, the Second Circuit refused to grant a rehearing and its order in connection therewith is set forth in Appendix E hereto. As a consequence, Connelly has filed this Petition for Certiorari to review the judgment of the Circuit Court affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT.

Summary of Argument

The decision of the District Court and the affirmance by the Second Circuit of that decision are in conflict with the decisions of this Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U. S. 1 (1970) and *Scherk v. Alberto-Culver Company*, 417 U. S. 506 (1974) which held that forum selection clauses must be enforced unless it can be clearly shown that their enforcement would be unreasonable or unjust. Moreover, the interpretation of the District Court of Section 9 of the United States Arbitration Act, 9 U. S. C. § 9 (1970) is an important question of federal law which has not been decided but should be settled by this Court. Finally, to the extent that the District Court exercised its power as a fact finder in interpreting the forum selection clause, it is apparent that it approached its task in this regard with a pre-conceived opinion of the motives of Connelly which is without basis in the record or otherwise. This has resulted in a serious case of injustice which by itself should be sufficient reason for this Court to review and reverse the decision of the District Court.

I.

The Issue of the Application of the Forum Selection Clause Is Not a "Pretext" and the District Court Abused Its Discretion in Exercising Its Fact Finding Powers in Interpreting the Forum Selection Clause.

The record facts in this case are not in dispute and the legal issues raised are rather simple. Notwithstanding this, the District Court determined without any basis in the record or otherwise what it conceived to be Connelly's

motives in raising the issue of the forum selection clause so that the District Court abandoned its obligation to be a neutral fact finder and instead directed its efforts against countering what it conceived to be Connelly's alleged motive. The attitude of the District Court is reflected in the first sentence of its opinion as follows:

> "Once again, this Court is confronted with an instance of 'a losing party seizing upon 'pretext for invalidating an arbitration award' . . . [citation omitted] and seeking by tenuous and baseless contentions to delay the consequences of that award." (Appendix A, p. 1)

It is quite obvious from the foregoing sentence of the District Court's opinion that his view was that Connelly was simply "grasping at straws" in order to delay the enforcement of the arbitration award. The use of the word "pretext" suggests some intellectual dishonesty on the part of Connelly and it is with this apparent attitude the Court then proceeded to approach its duties to find both the facts and the law.

Its duties as a fact finder should not have been difficult. The facts were not in dispute. Paragraph 11 of the contract between the parties selected New Brunswick, Canada as the forum for confirmation proceedings on any arbitration award. There is no other provision in the contract or otherwise which either specified or selected a forum for confirmation proceedings. Paragraph 11 was drafted by Mr. Lawson, an officer of Lake Utopia who was also an attorney. (R. Arbitration Proceedings Transcript, pp. 33, 245 and 245-a). Connelly signed the contract as drafted by Lawson without change except for spelling of Connelly's name in one place. (R. Arbitration Proceedings Transcript, p. 38). In addition to selecting New Brunswick, Canada as the place for any confirmation

proceedings on any arbitration award, the contract also selected the law of New Brunswick, Canada to be applicable to any dispute between the parties. (R. Petition to Confirm Arbitration Award, ¶ 14). Lake Utopia itself is a New Brunswick, Canada corporation based in New Brunswick, Canada.

Notwithstanding the foregoing facts which are undisputed, the District Court made its decision with respect to the intent of the parties solely on a semantic basis. Ignoring all of the undisputed facts, the District Court found that the use of the word "may" did not indicate an intent that New Brunswick, Canada be the *exclusive* jurisdiction in which confirmation proceedings could be held.

Connelly agrees that if you only look at the word "may" and nothing else in the record, the District Court correctly decided the issue of the forum selection clause in this case. However, why did the Court not look at or, at least, discuss the other undisputed facts in the case which would suggest, if not mandate, that despite the use of the permissive verb "may", the parties real intent was the selection of New Brunswick, Canada as the place for confirmation proceedings on any arbitration award. The only explanation one can find is that once the Court decided that Connelly's sole motive was delay, it simply rejected any evidence to the contrary despite the fact it was undisputed.

In its opinion, the District Court also proceeded to raise a number of issues which can only be called "straw men". For instance, the District Court states that Connelly relied upon the case of *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2nd Cir. 1973). The District Court states in its opinion that Connelly's reliance upon this case is "misplaced". (Appendix A, p. 5). Connelly cited this case together with the case of *I/S Stavborg v. National*

Metal Converters, Inc., 500 F. 2d 424 (2nd Cir. 1974) to demonstrate that there must be not only a "consent to entry of judgment" clause in the agreement but also that there must be a finding that the parties intended to have judgment on the arbitration award entered in the federal court in which the confirmation proceedings are pending. (R. Supplemental Memorandum of Connelly Containers, Inc., pp. 6-7).

The District Court attempting to restate what it believed to be Connelly's position with respect to the *Varley* case, *supra*, stated:

> "Applying *Varley* to the instant action, Connelly argues that this Court must dismiss for lack of jurisdiction regardless of whether or not we conclude that the agreement mandates confirmation in New Brunswick." (Appendix A, p. 5).

Connelly did not argue this. *Varley v. Tarrytown Associates, Inc., supra,* does not affect the outcome in this case one way or the other. All *Varley v. Tarrytown Associates, Inc.* held was that there must be a "consent to entry of judgment" clause to make the arbitration agreement enforceable and Connelly has admitted from the very beginning there is such a "consent to entry of judgment" clause in the contract. Therefore, this statement in the District Court's opinion makes no sense whatsoever and is but further evidence of the District Court's erroneous viewpoint that Connelly was simply attempting to delay the proceedings rather than litigating the matter in good faith.

Further evidence of the District Court's viewpoint as to Connelly's motives is suggested by the discussion in his opinion relating to Rule 46 of the American Arbitration Rules. (Appendix A, p. 6). As the District Court notes,

Rule 46 was amended after the parties entered into their contract to add subparagraph (c) which was a "consent to entry of judgment" clause. It is obvious, and no one disputes, that the amendment to Rule 46 was made in response to the decision in *Varley v. Tarrytown Associates, Inc., supra.*

Amended Rule 46 (c) of the American Arbitration Association provides as follows:

> "Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof." (R. Joint Appendix, Second Circuit, A-20).

The District Court's view of the effect of Amended Rule 46(c) on the issues in the case was stated as follows in the opinion:

> "Because Rule 46 as amended was in effect at all times during the arbitration proceedings in 1978, Connelly is incorrect in arguing that it has not consented to the entry of judgment of the arbitration award in a federal court. See *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F. 2d 1263 (7th Cir. 1976)." (Appendix A, p. 6).

Connelly never did contend at any time that Amended Rule 46(c) was invalid or not in force during the pendency of this case despite the fact that it was adopted after the contract had been executed. Connelly recognized that *Commonwealth Edison Co. v. Gulf Oil Corp., supra,* held that Amended Rule 46(c) applied to contracts executed prior to the adoption of the amendment as long as the actual arbitration proceedings were commenced after the

adoption of the amendment. Connelly has no disagreement on this point and never did in these proceedings.

However, what Connelly attempted to point out to the District Court was that there is a difference between a "consent to entry of judgment" clause and a forum selection clause. This was the reason for citing *Varley v. Tarrytown Associates, Inc.*, and *I/S Stavborg v. National Metal Converters, Inc., supra.* The fact that the parties may have consented to entry of judgment in any Court in the United States does not mean that the parties intended the confirmation proceedings to be held in any one of those courts or that the parties preference for New Brunswick, Canada as the place for confirmation proceedings had changed.

It was Connelly's position that if you laid paragraph 11 of the contract and Amended Rule 46(c) side by side together with the undisputed facts in this case, one would still have to reach the conclusion that New Brunswick, Canada was the obvious preference of the parties for confirmation proceedings on any arbitration award. That preference should be given effect unless some good reason could be demonstrated for not doing so.

It is quite obvious that Amended Rule 46(c) is not a forum selection clause as that phrase is used in *The Bremen v. Zapata Off-Shore Co., supra,* and *Scherk v. Alberto-Culver Company, supra.* All that it does is create the possibility of confirmation proceedings in any federal or state court in the country. Clearly, it had no impact on the expressed intent of the parties in paragraph 11 in selecting New Brunswick, Canada as the place for confirmation proceedings.

It is noteworthy that the District Court in its opinion does not attempt to distinguish this Court's decision in *The Bremen v. Zapata Off-Shore Co., supra,* and *Scherk v. Alberto-Culver Company, supra.* In fact, the District Court opinion does not even mention these two cases. In short, the District Court completely ignores the issue of whether paragraph 11 of the contract was, in fact, a forum selection clause entitled to enforcement absent some showing by Lake Utopia that it should not be enforced.

As demonstrated, the issue of the application of paragraph 11 of the contract between the parties as a forum selection clause is not a "pretext" but a legitimate issue which deserves fair consideration by the Court. The mere fact that sustaining Connelly's position on this issue may delay the possible enforcement of the arbitration award does not justify the failure to give the issue fair consideration. Lake Utopia certainly could have filed the confirmation proceedings in New Brunswick, Canada but instead chose to short-cut the agreed procedure of the parties thereby risking the possibility of delay. Nothing in the record suggests why Lake Utopia did not file these confirmation proceedings in New Brunswick, Canada as contemplated by the contract between the parties and absent some valid reason or excuse for not doing so, the forum selection clause should be enforced in accordance with the decisions of this Court.

II.

The Forum Selection Clause Sufficiently Specifies New Brunswick, Canada as the Place for Confirmation Proceedings So That the District Court Was Not the Proper Venue Under Section 9 of the United States Arbitration Act to Hold the Confirmation Proceedings.

Lake Utopia has based the jurisdiction of the District Court to entertain the confirmation proceedings in this case on Section 9 of the United States Arbitration Act, 9 U. S. C. § 9 (1970). That Section provides that if the parties in

their agreement have specified a Court in which judgment upon the award may be entered, that Court should entertain the proceedings for entering judgment on the award. However, if no Court is specified, only then may the District Court wherein the award was made entertain the confirmation proceedings.

The word "specify" means simply "to mention specifically". Black's Law Dictionary, Revised Fourth Edition, p. 1571. It is clear that paragraph 11 of the contract did mention specifically New Brunswick, Canada. Moreover, no other court was mentioned specifically. Even Amended Rule 46(c) does not mention a specific court. This is one of the obvious reasons why Amended Rule 46(c) is not a forum selection clause but simply a "consent to entry of judgment" clause.

It is also apparent that the District Court's interpretation of the word "specify" indicated its belief that words of "mandatory effect" had to be used in the agreement in order to qualify as specifying language. However, it is Connelly's position that there is no reason why words of preference are not sufficient to meet the requirements of Section 9.

For instance, it is quite clear under the undisputed circumstances of this case, that the parties obviously contemplated only one jurisdiction wherein confirmation proceedings would be held. Amended Rule 46(c) did not enlarge their contemplation. It simply expanded the explicit possibilities. Nevertheless, New Brunswick, Canada remained the clear preference as the location for the confirmation proceedings.

No policy reason was advanced by the District Court for the strict interpretation it gave to the word "specify". No reason was advanced for adopting an interpretation which, in most cases, would result in requiring the confirmation proceedings to be held in the district where the award was made.

The apparent lack of rationale for the strict position taken by the District Court in this case is magnified by the facts of this case. Neither Lake Utopia nor Connelly have any relevant connection with the District Court for the Southern District of New York. The locale of the arbitration hearing was strictly fortuitous and had no relevance to the controversy itself or to the parties. Lake Utopia is based in New Brunswick, Canada and Connelly in Bala Cynwyd, Pennsylvania. Certainly, there is no federal or international policy which is advanced by such an interpretation and, in fact, if anything, the interpretation of the Court in this case is contrary to the decisions of this Court in *Scherk v. Alberto-Culver Co., supra,* and *The Bremen v. Zapata Off-Shore Co., supra.* Both of the foregoing cases indicated that liberal rather than strict construction should be given to the application and enforcement of forum selection clauses rather than the strict construction which was given in this case.

The District Court for the Southern District of New York was, in effect, a legal no man's area. It had no connection with the facts or the parties in the case. On the contrary, New Brunswick, Canada had a substantial and relevant connection to both the parties and the merits of the case. Lake Utopia, a party, is based and operates in New Brunswick, Canada. Furthermore, the law of New Brunswick, Canada was selected under paragraph 14 of the contract between the parties as the applicable law to any controversy between the parties. New Brunswick, Canada, therefore, certainly had a substantial and relevant connection to both the merits of the case as well as the parties.

Admittedly, the apparent interpretation given to the word "specify" in Section 9 by the District Court in this

case is a possible interpretation. However, such an interpretation makes little sense as applied to the facts of this case or any other case where the forum for the arbitration proceedings itself are selected fortuitously without any relevance to the parties or the choice-of-law provision in the contract. Further, the adopted interpretation does not further any federal policy on arbitration disputes. Accordingly, it is respectfully suggested that the world "specify" simply means that the parties have to express their preference for a particular forum without the necessity that that forum be the mandatory and exclusive forum.

III.

Even if the District Court Had Jurisdiction to Entertain the Confirmation Proceedings, It Should Have Abstained From Entertaining Such Jurisdiction and Instead Enforced the Forum Selection Clause Which Selected New Brunswick, Canada as the Forum for Confirmation Proceedings.

As noted before, there is nothing in this case which suggests that the parties did not intend New Brunswick, Canada as the expected place for the confirmation of any arbitration award. Even Amended Rule 46(c) did not select a particular forum.

The choice-of-law provision in the contract between the parties, paragraph 14, makes the law of New Brunswick, Canada applicable exclusively to any controversy between the parties. It has been suggested that the choice-of-law provision in a contract is indicative of the intent of the parties with respect to where confirmation proceedings should be held on an arbitration award. *I/S Stavborg v. National Metal Converters, Inc., supra,* p. 427.

Apparently, the only factor which seems to have made the court gravitate toward rejecting every single contention of Connelly is the unfounded and unsupported

conclusion that Connelly's motive in raising the forum selection issue is simply delay. As noted before, there would have been no delay had Lake Utopia proceeded to file its petition in New Brunswick, Canada and the delay that has resulted is only because of the attempt of Lake Utopia to shortcut the procedure agreed upon by the parties.

It is Connelly's contention that Lake Utopia proceeded to file these proceedings in the District Court only because it believed that Connelly would be hand-cuffed in attempting to have the award set aside on the merits. Connelly did make extensive arguments in the District Court on the merits while well-recognizing the limited review which the federal court decisions have indicated are applicable in testing the validity of an arbitration award. That "limited review" is exactly what was applied by the District Court in rejecting Connelly's contentions on the merits which is probably exactly what Lake Utopia expected by forcing Connelly to litigate that issue in the District Court.

Lake Utopia, at the time it filed its petition in the District Court, was well aware that a Canadian court would test the validity of any arbitration award using the same standard that it would test any decision in its own trial courts. This would mean that the award could be upset for errors of law and mistakes in findings of fact and for such other reasons as would constitute reversible error if the decision were rendered in a trial court. *Toronto Police Association v. Board of Commissioners,* 1 S. C. R. 630 (Can. Sup. Ct. 1975). Lake Utopia avoided this possibility by filing the confirmation proceedings in the District Court.

This Court in *Scherk v. Alberto-Culver Co., supra,* at pp. 516-517 condemned the possibility of such legal opportunism as follows:

> "A parochial refusal by the courts in one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . [t]he dicey atmosphere of such a legal no man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

The refusal of the District Court in this case to enforce the forum selection clause has rewarded the attempted jockeying for tactical litigation advantage by Lake Utopia. Connelly is now in the position where it must say to itself, "It should have gone immediately to New Brunswick, Canada to file a petition to vacate the arbitration award in order to preserve its right as to a full scope of review of the award under Canadian law." This is exactly the "dicey atmosphere" which this Court in *Scherk v. Alberto-Culver Co., supra,* indicated should be avoided. For this reason, even if the District Court decided that it had jurisdiction under Section 9 of the United States Arbitration Act, it should have abstained from exercising such jurisdiction and instead directed Lake Utopia to file its confirmation proceedings in New Brunswick as contemplated by the contract between the parties.

CONCLUSION.

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Civ 510 (LBS)

In the Matter of Arbitration

between

LAKE UTOPIA PAPER LIMITED,
Petitioner,

and

CONNELLY CONTAINERS, INC.,
Respondent.

Opinion.

(Filed May 11, 1979)

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SAND, *D. J.*

Once again, this Court is confronted with an instance of "a losing party seizing upon 'pretext for invalidating an arbitration award' ", *in re Arbitration between National Bulk Carriers, Inc. and Princess Management Co.*, No. 78-7490, slip op. at 1983 (2d Cir. April 3, 1979), and seeking by tenuous and baseless contentions to delay the consequences of that award.

We grant petitioner's motion for an order: confirming the arbitrator's award pursuant to 9 U. S. C. § 9 (1970); directing that judgment be entered for petitioner in the amount of $650,000 plus interest on such amount from the date of the award, and denying respondent's counterclaim; and allowing petitioner the costs of this proceeding. We deny respondent's motion to dismiss the petition for lack of jurisdiction or alternatively, to vacate the award.

FACTS

The facts are simply stated. Petitioner, Lake Utopia Paper Limited ("Lake Utopia"), is a corporation organized under the laws of New Brunswick, Canada, with its principal place of business at St. John, New Brunswick, Canada. Respondent, Connelly Containers, Inc. ("Connelly"), is a corporation organized under the laws of Pennsylvania with its principal place of business in that state.

On August 29, 1973, petitioner and respondent entered into an agreement for the sale of certain corrugated materials in foreign commerce. Paragraph 11 of that agreement provided for the submission to arbitration of any controversy or claim arising out of or related to the agreement "in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered by the highest court

in New Brunswick, having jurisdiction." The contract provided that it was to be interpreted in accordance with the laws of New Brunswick. Thereafter a dispute arose between the parties, the principal issue of which related to the applicability of a *force majeure* clause in the contract.

Pursuant to the provisions of the agreement, the dispute was submitted to arbitration under the supervision of the American Arbitration Association ("Association"). The arbitration took place in New York City. Connelly brought a declaratory judgment action in the Court of Common Pleas of Montgomery County, Pennsylvania, alleging that the contract was unenforceable or that it had not been breached. The case was removed to the federal court by Lake Utopia, the defendant in that action.

The issue presented to the District Court for the Eastern District of Pennsylvania was whether the proceeding was governed by the New Brunswick Arbitration Act, 9 U. S. C. §§ 1 *et seq.* (1970) or the United States Arbitration Act, 9 U. S. C. §§ 1 *et seq.* (1970). After reviewing the relevant authorities, the district court concluded: "In the absence of a specific choice of tribunal clause by the parties, we conclude that the United States Arbitration Act governs the availability of judicial relief when the parties have submitted themselves to a comprehensive arbitration clause." *Connelly Containers, Inc. v. Lake Utopia Ltd.*, No. 76-293, slip op. at 4, (E. D. Pa. April 21, 1977). The decision was appealed to the United States Court of Appeals which dismissed the appeal for want of an appealable order. *Connelly Containers, Inc. v. Lake Utopia Limited*, No. 77-1839 (3d Cir. May 4, 1978).

During the course of the court proceedings, the arbitration proceeding continued in New York.[1] By unan-

1. The arbitration hearings were held on April 25, 1978, May 31, 1978, June 1, 1978 and June 22, 1978.

imous decision, dated January 5, 1979, the arbitrators awarded petitioner the sum of $650,000. on its claim, denied the counterclaim in its entirety and apportioned the compensation of the arbitrators between the parties.

DISCUSSION

Connelly contends that this Court lacks subject matter jurisdiction to confirm the petition because the agreement provides that judgment upon the award may be entered in New Brunswick. Alternatively, Connelly argues that this Court should set aside the award because it is in disregard of applicable Canadian law.

We reject the contention that judgment can be entered only by a New Brunswick court. Section 9 of the United States Arbitration Act allows the parties to agree upon a court to confirm an arbitration award:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award. . . . If no court is specified in the agreement of the parties, then application may be made to the United States court in and for the district within which such award was made."

Such an agreement, however, was not made in this case. Although we agree with Connelly that paragraph 11 of the agreement provides that a judgment award "*may* be entered by the highest court in New Brunswick" [emphasis added], we find that the designation of a single tribunal, in which an award "may" be confirmed, does not indicate an intent that the designated court have exclusive jurisdiction. We also reject respondent's argument that pursuant to § 9 of the Arbitration Act the agreement only has to "specify" the court in which an award is to be confirmed and that the designation of a court in which judgment "may" be entered must be given mandatory effect.

Similarly, we find respondent's reliance on *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2d Cir. 1973) is misplaced. In *Varley,* the parties provided in their contract that any controversy arising under the agreement should be settled by arbitration pursuant to the Rules of the Association. There was no explicit provision in the underlying agreement for entry of judgment in any forum. In the absence of such a provision or evidence that the parties intended that the award be confirmed in a federal forum, the Second Circuit rules that the district court could not entertain a motion to confirm the award:

> "It does not follow however, that simply because the contract in issue involves interstate commerce, a federal court has jurisdiction to confirm the award and enter judgment. The Act provides that confirmation of an arbitration award is appropriate only where the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award . . .' 9 U. S. C. § 9. There was no such explicit agreement here but only a clause providing for the settlement of controversies by arbitration pursuant to the rules of the American Arbitration Association . . ." 477 F. 2d at 210.

Applying *Varley* to the instant action, Connelly argues that this Court must dismiss for lack of jurisdiction regardless of whether or not we conclude that the agreement mandates confirmation in New Brunswick. Under respondent's theory, if we conclude that the parties intended

that arbitration take place in New Brunswick, we have made an implicit finding that a federal forum was not intended. On the other hand, if we conclude that the parties did not intend that arbitration take place in New Brunswick, we are still without jurisdiction because the parties did not designate a federal forum.

Respondent's argument, however, ignores significant developments in the law and changes in the rules of the Association. At the time *Varley* was decided, the Association's rules did not designate a forum but merely recommended insertion of a clause in all commercial contracts that "judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof." [2] In November, 1973, Rule 46 was amended to provide that "[p]arties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof."

Although amended Rule 46 was not in effect when the contract was executed, this rule applies to the instant action because the parties incorporated the Rules of the Association and any amendment into their agreement.[3] Rule 1 of the Association explicitly provides:

> "The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Association or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining *at the time the arbitration is initiated.*" [emphasis added].

2. See discussion of the then-existing Rules of the Association in *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208, 210 (2d Cir. 1973).

3. The parties incorporated by reference in their agreement "the rules then obtaining" of the Association.

Because Rule 46 as amended was in effect at all times during the arbitration proceedings in 1978, Connelly is incorrect in arguing that it has not consented to the entry of judgment of the arbitration award in a federal court. See *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F. 2d 1263 (7th Cir. 1976).

Alternatively, Connelly argues that the decision of the arbitrators was irrational and in clear disregard of applicable Canadian law. Specifically, Connelly contends that the award of loss-profit damages was irrational because it conflicted with the factual findings underlying the liability section of the award:

> "[i]t is a simple, inescapable conclusion that the arbitrators could not have decided there was an available market in deciding the liability part of the case and then have applied a measure of damages which would only be applicable where a non-available market existed. The result produced is in clear disregard of the applicable law and that law was clearly made known to the arbitrators by Lake Utopia itself." Respondent's Supplementary Memorandum at 35.

We have reviewed this contention pursuant to the limited review provided under the Federal Arbitration Act. We find no basis whatsoever for disturbing the award of the arbitrators.

Conclusion

Accordingly, petitioner Lake Utopia's motion to confirm the award of the arbitrators is granted. We deny respondent Connelly's motion to dismiss the petition for lack of jurisdiction and its alternative motion to vacate the award.

SO ORDERED.

Dated: New York, New York
May 9, 1979

/s/ LEONARD B. SAND
U. S. D. J.

APPENDIX "B".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

79 Civ 510 (Lbs)

In the Matter of the Arbitration

between

LAKE UTOPIA PAPER LIMITED,
Petitioner,

and

CONNELLY CONTAINERS, INC.,
Respondent.

Judgment.
(Filed May 29, 1979)

The motion and petition of Lake Utopia Paper Limited for confirmation of an arbitration award pursuant to 9 U. S. C. § 9 (1970) and the petition of Connelly Containers, Inc. to dismiss this proceeding and vacate the award of the arbitrators having come on to be heard before this Court on March 8, 1979, and this Court having filed its opinion in this matter, dated May 10, 1979, it is

ORDERED, that the petition and motion of Lake Utopia Paper Limited to confirm the award of the arbitrators in

favor of Lake Utopia Paper Limited is hereby granted, and it is

ORDERED, that the petition of Connelly Containers, Inc. is denied, and it is further

ORDERED, ADJUDGED AND DECREED, that judgment be entered for Lake Utopia Paper Limited in the amount of $650,000.00 plus interest of $15,058.33 from January 5, 1979 to and including May 24, 1979, plus $108.33 interest for each day thereafter until judgment is entered, and that Lake Utopia Paper Limited recover the costs of this proceeding.

Dated: May 24, 1979

/s/ LEONARD B. SAND
Leonard B. Sand
United States District Judge

Judgment entered 5/30/79

Raymond F. Burghardt
Clerk

APPENDIX "C".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 127—September Term, 1979.

(Argued September 12, 1979

Decided October 1, 1979.)

Docket No. 79-7414

In the Matter of the Arbitration

Between

LAKE UTOPIA PAPER LIMITED,
Petitioner-Appellee,

and

CONNELLY CONTAINERS, INC.,
Respondent-Appellant.

Before:

MULLIGAN, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge,* confirming an arbitration award in favor of petitioner-appellee. Appellee seeks damages and double costs flowing from the defense

of the appeal. Judgment affirmed, request for damages and double costs denied.

HARRY P. BEGIER, JR., Philadelphia, PA (Whitman & Ransom, New York, New York, Cozen, Begier & O'Connor, Philadelphia, Pennsylvania, of counsel), *for Respondent-Appellant.*

BOB D. MANNIS, New York, New York, (J. Paul McGrath, John Patrick Deveney, Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York, of counsel), *for Petitioner-Appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge,* confirming an arbitration award in favor of petitioner-appellee, Lake Utopia Paper Limited, a New Brunswick, Canada corporation and against respondent-appellant Connelly Containers, Inc., a Pennsylvania Corporation. The question raised on appeal is whether the United States Arbitration Act confers jurisdiction on the district court to confirm the award. We hold that it does and we affirm substantially on the opinion of Judge Sand below.

Claiming that the appeal is frivolous, appellee asks that pursuant to 28 U. S. C. § 1912 and Fed. R. Civ. P. 38 Connelly be assessed double costs, reasonable attorneys' fees for this appeal, and interest at the rate of 13.77 percent. In support of this request, appellee states in its brief:

> The District Court's opinion as to the frivolous nature of Connelly's contentions is clear. At the pre-argument conference in connection with this appeal, moreover, Connelly was advised by Staff Counsel that in Counsel's opinion the appeal was baseless and should be dropped. Connelly has disregarded the opinions of both the District Court and Staff Counsel.

Appellee's brief at 12. The inclusion of such information in a brief is highly improper and will not be condoned.

The pre-argument conference alluded to took place in accordance with the Civil Appeals Management Plan, which has been adopted by this Circuit to expedite the processing of civil appeals. The Plan has the force and effect of a local rule and provides in pertinent part as follows:

> 5. *Pre-Argument Conference . . .*
>
> a) In cases where he may deem this desirable, the staff counsel may direct the attorneys to attend a pre-argument conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the staff counsel determines may aid in the handling or the disposition of the proceeding.

Chief Judge Kaufman, in discussing *The Pre-Argument Conference: An Appellate Procedural Reform,* 74 Col. L. Rev. 1094, 1098 n. 14 (1974), explained that the Second Circuit has made the choice of having pre-argument conferences held by a Staff Counsel rather than a judge for two reasons:

> To further both practical objectives and the interests of justice, the Judicial Council provided for the use

of Staff Counsel rather than judges to conduct pre-argument conferences.

The result of this choice is that:

> CAMP has insulated the judges from pre-argument conferences. The panel which may ultimately hear an argument is never informed about the conduct of counsel at the conference.

To ensure that all participants are aware of the ground rules, the following notice is posted on the door of the room where pre-argument conferences take place.

> *CIVIL APPEALS MANAGEMENT PLAN* (CAMP)
> *PRE-ARGUMENT CONFERENCES*
>
> A pre-argument conference is for the purpose of considering the possibility of settlement, the simplification of the issues, and any other matters which the Staff Counsel determines may aid in the handling or the disposition of the proceeding.
>
> If there is any pertinent matter which counsel wishes to be raised, he/she may raise it at the conference.
>
> The conference itself is held by the Staff Counsel under the rules of the Court of Appeals for the Second Circuit.
>
> The normal format for the conference involves the appellant indicating the error below and the reasons why there should be a change in the judgment being appealed. Thereafter, the appellee normally indicates the basis for his/her position.
>
> The conference itself is informal and *all matters discussed are confidential to the parties at the conference, and are not reported to any Judge of the Court.* The only report that is made is that there was a pre-argument conference held and what the result was. *Any notes taken during the conference are confidential and are likewise not available to the Judges.*
>
> *Whatever views Staff Counsel expresses are his own and are not the result of any prior discussion with the Judges nor are they discussed following the conference.*
>
> Attorneys appearing at a pre-argument conference are required to have authority to do whatever is necessary to accomplish the purpose of the conference.
>
> You are responsible to advise all the other attorneys in this case of the date, time, and place of the conference, and of all the foregoing. If they have any questions, they are welcome to [telephone Staff Counsel's office].
>
> *OPINIONS CONCERNING MERITS OF APPEALS EXPRESSED BY STAFF COUNSEL ARE HIS OWN, NEITHER INFLUENCED BY NOR COMMUNICATED TO ANY MEMBER OF THE COURT.*

(Emphasis added.)

It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion often leading to "settlement, the simplification of the issues and [the resolution of] any other matters which the staff counsel determines may aid in the handling or the disposition of the proceeding." Civil Appeals Management Plan Rule (5)(a). If participants cannot rely on the confidential treatment of everything that transpires during these sessions then coun-

sel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.

In bringing to our attention a comment made by Staff Counsel about the merits of this appeal, appellee's counsel has committed a serious breach of the confidentiality essential to the purposes of pre-argument conferences. While we have great respect for the knowledge and experience of Staff Counsel we are not entitled to know, nor are we interested in learning his opinion on the merits of any appeal. He will not voluntarily communicate it to us and we deplore any compromising of the confidentiality of those comments by counsel for a party to the appeal.

We deny the request for damages and award no costs.

APPENDIX "D".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-7414

In the Matter of the Arbitration

Between

LAKE UTOPIA PAPER LIMITED,
Petitioner-Appellee,

And

CONNELLY CONTAINERS, INC.,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Petition of Respondent-Appellant Connelly Containers, Inc. for Rehearing.

WHITMAN & RANSOM
Attorneys for Respondent-Appellant
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

Of Counsel:

COZEN, BEGIER & O'CONNOR
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Philadelphia, Pennsylvania 19102
(9188) By Harry P. Begier, Jr., Esq.

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I. PRELIMINARY STATEMENT

Respondent-Appellant Connelly Containers, Inc. (hereinafter called "Connelly") respectfully petitions this Court for a rehearing of its decision of October 1, 1979 in the within matter.

In a *per curiam* opinion, the Court stated:

> The question raised on appeal is whether the United States Arbitration Act confers jurisdiction on the District Court to confirm the award. We hold that it does and we affirm substantially on the opinion of Judge Sand below.

For the reasons hereinafter set forth, it is the belief of Connelly that the Court has overlooked or misapprehended the questions raised by Connelly on appeal and the argument in support thereof.

II. STATEMENT OF FACTS

As indicated, this Court affirmed "substantially" on the opinion of Judge Sand below. Judge Sand's opinion held:

(1) The use of the word "may" in the forum selection clause did not indicate an intent that the designated forum have exclusive jurisdiction.

(2) The agreement did not "specify" the forum for confirming the arbitration award as required by

Section 9 of the Federal Arbitration Act so as to deprive the District Court of jurisdiction.

(3) Rule 46(c) of the American Arbitration Association conferred jurisdiction to confirm the award on the District Court.

(4) The District Court did not lack jurisdiction under the rule set forth in *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2d Cir. 1973).

(5) The arbitration award was not irrational or in clear disregard of the applicable law.

Since Connelly abandoned on appeal its attempt to establish the invalidity of the arbitration award under the Federal Arbitration Act, holding #5 will not be discussed herein.

III. POINTS OVERLOOKED OR MISAPPREHENDED

A. The questions presented and briefed on the appeal were the following:

(1) Did not the agreement of the parties selecting New Brunswick, Canada as the place for confirmation of the arbitration award "specify" the court for such confirmation proceedings within the meaning of Section 9 of the Federal Arbitration Act so that the District Court

did not have jurisdiction to confirm the award?

(2) Even if the forum selection clause did not "specify" New Brunswick, Canada as the place for the confirmation of the arbitration award within the meaning of Section 9 of the Federal Arbitration Act, should not the District Court have enforced the forum selection clause to require the confirmation proceedings to be held in New Brunswick, Canada?

B. Connelly never did argue in the District Court that the District Court lacked jurisdiction under the rule set forth in *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2d Cir. 1973), so that if the affirmance is based on that holding, it is erroneous.

C. Connelly never did argue in the lower court that Rule 46(c) did not confer jurisdiction on the District Court to confirm the award but that the forum selection clause made Rule 46(c) inapplicable for the purpose of selecting the forum in which the confirmation proceedings should take place. Therefore, if the affirmance is based upon the holding of the District Court with respect to Rule 46(c), the affirmance is erroneous.

D. Under the admitted circumstances of this case, the parties had specified within the meaning of Section 9

of the Federal Arbitration Act a court for the confirmation proceedings of the award so that the District Court did lack jurisdiction to confirm the award. The word "specify" means simply "to mention specifically." Black's Law Dictionary, Revised Fourth Edition, p. 1571. The forum selection clause not only specifically mentioned the courts in New Brunswick, Canada as the place for confirmation of the arbitration award, but mentioned no other court either specifically or non-specifically. Neither did Rule 46(c) of the American Arbitration Rules specify any particular court as it was not intended to be a forum selection clause but rather a consent to entry of judgment clause as required under the rule of *Varley v. Tarrytown Associates, Inc., supra.* Therefore, even though the parties used the word "may" in their forum selection clause rather than the

word "shall," it is clear that the clause was intended to have mandatory effect since there was no other court selected for confirmation proceedings either at the time the parties contracted or thereafter even with the adoption of Rule 46(c) of the American Arbitration Association.

E. Even if the Court determined that the District Court had jurisdiction under the Federal Arbitration Act to confirm the award, the District Court nevertheless should have enforced the forum selection clause requiring

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confirmation proceedings to take place in New Brunswick, Canada in accordance with the rule laid down in *The Bremen v. Zapata Off-Shore Co.*, 407 U. S. 1 (1970), and *Scherk v. Alberto-Culver Co.*, 417 U. S. 506 (1974). Both of the foregoing cases were cited in the brief filed by Connelly in both the District Court and this Court. Both of the foregoing Supreme Court cases dealt with the question of the enforceability of a forum selection clause which is exactly the type of clause which Connelly contends in this case requires the confirmation proceedings to have been held in New Brunswick, Canada. Both the District Court and this Court must have overlooked the rule set forth in the foregoing Supreme Court cases in arriving at their decision as these cases clearly require the District Court to exercise its jurisdiction not to confirm the arbitration proceedings but to enforce the forum selection clause and thus require the parties to go to the forum which they selected for that purpose.

F. The District Court in making its finding that the forum selection clause did not indicate an "intent" that New Brunswick be the exclusive jurisdiction for confirma-

tion of the award completely ignored the fact that at the time the contract was entered into the only provision in the contract regarding a forum for confirmation purposes was one which selected New Brunswick, Canada.

—5—

Obviously, therefore, at the time the parties contracted, the intent was to utilize the New Brunswick, Canada forum for the confirmation purposes. The finding of the District Court on the question of "intent" was obviously, therefore, clearly erroneous.

G. Moreover, it is reasonable to conclude that the contracting parties, after having their attorneys review the agreement, expected that the validity of any award would be tested not only by the law of New Brunswick, Canada but also in the Courts of New Brunswick, Canada. The expectation of the parties with respect to such reviewing process in the Courts of New Brunswick, Canada should have been that there is a far broader scope of review under Canadian law than under applicable American law. Under applicable Canadian law, a reviewing Canadian Court can vacate an arbitration award for errors of fact, law or procedure in the arbitration itself such as receiving improper evidence. *Toronto Police Association v. Board of Commissioners*, 1 S. C. R. 630 (Can. Sup. Ct. 1975). On the other hand, the scope of review, as noted by the District Court in its opinion, under the Federal Arbitration Act is very narrow and, in fact, so narrow as to almost be non-existent. Under the interpretation of the forum selection clause made by the District Court, therefore, it would have been permissible for Lake

—6—

Utopia to have either gone to the Courts in New Brunswick, Canada or to the American Courts for review of any award. Obviously, if it were the losing party, it would have gone to the Canadian Courts with a broader scope of review in the hope of vacating the award but being the winning party it would go to the American Courts as it has in this case, to have the scope of review so narrow as to make it almost impossible to vacate the award. This type of tactical litigation advantage is exactly what was condemned by the Supreme Court in the *Scherk v. Alberto-Culver Co.* case, *supra,* pp. 516-517.

H. The interpretation which the District Court placed upon the forum selection clause changed the reasonable commercial expectation of the parties with respect to where the confirmation proceedings would be held and the applicable law to such confirmation proceedings contrary to the rule laid down in *Scherk v. Alberto-Culver Co., supra,* and *The Bremen v. Zapata Off-Shore Co., supra.*

IV. CONCLUSION

It is respectfully suggested that the Court overlooked or misapprehended the law, facts or argument made by Connelly with respect to this case in concluding that

the only question raised on the appeal was whether the District Court had jurisdiction to confirm the arbitration award. The additional question raised by Connelly and not answered by the Court's *per curiam* opinion is whether the District Court should have exercised its jurisdiction not to confirm the arbitration award but rather to enforce the forum selection clause requiring such confirmation proceedings to take place in New Brunswick, Canada.

If the Court applies the rule laid down in *The Bremen v. Zapata Off-Shore Co., supra,* and *Scherk v. Alberto-Culver Co., supra,* the forum selection clause requiring confirmation proceedings to take place in New Brunswick, Canada must be enforced and the District Court, therefore, should have refrained from exercising its jurisdiction to hold confirmation proceedings on the award.

The District Court was clearly erroneous in determining that Rule 46(c) of the American Arbitration Rules constituted a forum selection clause which overrode the specific provisions of the parties' agreement selecting New Brunswick, Canada as the forum in which the confirmation proceedings should be held. Rule 46(c) was only designed to meet the jurisdictional problem raised by the

rule in *Varley v. Tarrytown Associates, Inc., supra,* and was not intended as a forum selection provision so that effect should have been given to the intent of the parties in enforcing their forum selection clause for the confirmation proceedings. Even with the use of the word "may" in the forum selection clause, it is obvious from the circumstances that existed at the time of contracting that the parties' intent clearly was that New Brunswick, Canada would be the sole forum wherein the confirmation proceedings would take place. Under the rule laid down by the Supreme Court in the aforesaid cases, such a forum selection clause must be enforced so that the District Court's decision must be reversed not necessarily because the District Court lacked jurisdiction to confirm the arbitration award, although that is still one of the arguments of Connelly but rather because the District Court should have refrained from exercising its jurisdiction to review

the award and instead exercised its jurisdiction to enforce the forum selection clause.

Respectfully submitted,

WHITMAN & RANSOM
Attorneys for Respondent-Appellant
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

Of Counsel:

COZEN, BEGIER & O'CONNOR
Three Penn Center Plaza
N. E. Corner 16th & Market Sts.
Philadelphia, Pennsylvania 19102
(215) 864-1922

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

RICHARD BASS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 900 Baychester Avenue, Bronx, New York.

That on the 15 day of October, 1979, deponent personally served the within Petition of Respondent Appellant Connelly Containers, Inc. for rehearing upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Dewey Ballantine Bushby Palmer & Wood
Attorneys for Petitioner Appellee
140 Broadway
New York, N. Y.

Sworn to before me this 15 day of October, 1979.

/s/ RICHARD BASS
/s/ MICHAEL DESANTIS
Michael DeSantis
Notary Public, State of New York
No. 03-0730908
Qualified in Queens County
Commission Expires March 30, 1981

APPENDIX "E".

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

79-7414

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and seventy-nine.

Present:

HON. WILLIAM H. MULLIGAN
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges.

In the Matter of the Arbitration

Between

LAKE UTOPIA PAPER LIMITED
Petitioner-Appellee

v.

CONNELLY CONTAINERS, INC.
Respondent-Appellant

(Filed Nov. 5, 1979)

A petition for a rehearing having been filed herein by counsel for the

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
A. Daniel Fusaro, Clerk

APPENDIX "F".

9 U. S. C. § 9 (1970).

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Supreme Court, U. S.
FILED
JAN 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-861

CONNELLY CONTAINERS, INC.,
Petitioner,

v.

LAKE UTOPIA PAPER LIMITED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. PAUL MCGRATH
140 Broadway
New York, New York 10005
Attorney for Respondent

Of Counsel:
DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

January 2, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-861

CONNELLY CONTAINERS, INC.,
Petitioner,

v.

LAKE UTOPIA PAPER LIMITED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Was the court of appeals correct in unanimously affirming the judgment of the district court which confirmed an arbitration award in favor of Lake Utopia Paper Limited?

Statement of the Case

Petitioner Connelly Containers, Inc. ("Connelly") seeks to have this Court review the decision of the United States Court of Appeals for the Second Circuit which unanimously affirmed the judgment of the district court confirming a commercial arbitration award in favor of Lake Utopia Paper Limited ("Lake Utopia"). For purposes of these proceedings, Connelly's statement of the facts is essentially correct.

ARGUMENT

THE PETITION PRESENTS A SINGLE FACTUAL QUESTION AND ADVANCES NO VALID REASON FOR GRANTING CERTIORARI

The sole question presented to this Court by Connelly's petition is a factual one, whether the district court "abused its discretion in exercising its fact finding powers in interpreting the forum selection clause" of the contract entered into by these parties. (Petition at 7.) The application of Section 9 of the United States Arbitration Act, 9 U.S.C. § 9 (1976), and Connelly's claim—stated, but unexplained—of a conflict between the lower courts' opinions and this Court's decisions in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), both turn upon Connelly's dispute with the district court's finding that the parties agreed in their contract that confirmation of an arbitration award and judgment thereon might be sought in the district court. This factual question was correctly decided by the lower courts and meets none of the considerations governing review on certiorari. *See* Sup. Ct. R. 19.

Paragraph 11 of the contract between Lake Utopia and Connelly provides:

> "ARBITRATION: Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered by the highest court in New Brunswick, having jurisdiction." (Petition at 3.)

Rule 46(c) of the Commercial Arbitration Rules of the American Arbitration Association, which as Connelly admits was validly incorporated by the parties into their contract and was in existence at the time the arbitration proceeding was commenced and at all times thereafter, provides:

> "Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof." (Appendix A hereto.)

Because the contract incorporated Rule 46(c) and also provided for possible entry of judgment in New Brunswick, Lake Utopia clearly had a choice of courts to which it could resort to confirm the arbitration award and it properly applied for confirmation to the district court, which had jurisdiction over the arbitration as one involving "commerce" within the meaning of 9 U.S.C. §§ 1 and 2 (1976).

The venue of confirmation proceedings is governed by Section 9 of the United States Arbitration Act, which provides in pertinent part:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9 (1976).

The Southern District of New York was the district within which the arbitration took place and was additionally a possible forum for confirmation proceedings encompassed within the intent of the parties in their contact. Connelly's sole argument against this conclusion is that, although the parties had agreed that judgment upon an award *may* be entered in New Brunswick, they really had intended that judgment *must* be entered there exclusively. The district court quite properly rejected this argument. *See* Petition, Appendix A at A-4. Connelly reaches its curious conclusion only by ignoring the explicit language of Paragraph 11 of the contract and the equally explicit language

of Rule 46(c) of the Commercial Arbitration Rules of the American Arbitration Association.

Connelly's vague references to a possible conflict between the lower courts' decisions in this case and this Court's decisions in *Scherk v. Alberto-Culver Co., supra,* and *The Bremen v. Zapata Off-Shore Co., supra,* are equally wide of the mark. The cases are simply inapposite. In *The Bremen,* for example, the relevant clause provided:

> "Any dispute arising must be treated before the London Court of Justice." 407 U.S. at 2.

This Court found that the clause construed in *The Bremen* was "clearly mandatory and all-encompassing" (407 U.S. at 20), whereas in the instant case the district court found that the parties had clearly allowed themselves a choice. In *Scherk v. Alberto-Culver Co., supra,* the issue was whether the parties' dispute would be settled by arbitration, pursuant to an arbitration clause in the contract, or by a court; this Court held that the arbitration clause would be enforced. Neither case addresses the question presented here, and neither is in conflict with the decisions below.

The petition for a writ of certiorari involves a simple factual question that was correctly decided in the courts below. There is no conflict with the decisions of this Court and no important question of federal law which should be decided by this Court.

CONCLUSION

No questions raised in the petition make review by this Court appropriate, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

Appendix A

Rule 46(c) of the Commercial Arbitration Rules of the American Arbitration Association

Parties to these Rules shall be deemed to have consented that judgment upon the aribitration award may be entered in any Federal or State Court having jurisdiction thereof.